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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1189

CAPTAIN LEWIS T. MOORE,

Petitioner,

—v.—

JAMES R. SCHLESINGER,
Secretary of Defense, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, Captain Lewis T. Moore, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on November 21, 1975. The Court of Appeals affirmed the judgment of the United States District Court for the

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District of Colorado entered on October 29, 1974, dismissing the case for lack of jurisdiction.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, which is unreported, is set out in the Appendix, infra, p. 1a. The opinion of the District Court, which is unreported, is set out in the Appendix, infra, p. 9a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Where a verified complaint alleges that a military person's tour of duty as an instructor at the Air Force Academy was improperly terminated and a punitive transfer to other duty imposed, all as a result of the writing of letters to Congress critical of practices at the Academy, was it proper to dismiss the complaint for lack of jurisdiction, on the following grounds:

1. That "only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether and thus constitute an abuse of the broad

discretion granted to military officers in their command, will the Court be said to have jurisdiction to review the merits of such a dispute?"

2. That the requisite jurisdictional amount under 28 U.S.C. §1331 was absent, even though petitioner had not been afforded an opportunity to prove the amount in controversy requirement?

3. That the complaint did not state a cause of action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388?

STATUTORY PROVISIONS INVOLVED

10 U.S.C. §1034:

"Communicating with a member of Congress. No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."

STATEMENT OF THE CASE 1/

Petitioner is a graduate of the Air

1/ The Statement of the case is taken

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Force Academy and a regular commissioned officer in the United States Air Force. In 1970 he was assigned to a four-year tour, through June of 1974, to the faculty of the United States Air Force Academy as an instructor. During the first three years of his teaching he received a consistently high rating as "outstanding." On February 20, 1973, petitioner wrote various members of Congress about Academy policies and practices concerning faculty tenure, the honor system, handling of cadet morale and drug problems, the high cadet attrition rate, and problems of internal and external credibility.

As a result of these letters, investigations of the Academy were launched almost immediately by the General Accounting Office and the high command of the Air Force. On March 13, 1973, Moore was assured by the head of his department that there would be no retaliation. Nevertheless, as a result of the letters and within a few days after the Accounting Office investigation was started, his four-year tour of teaching was curtailed and, while teaching a class, he was given a notice of termination on March 23, 1973. The complaint alleges that his removal from the classroom was in retaliation for having written the letters, a device to

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from petitioners' complaint whose allegations are taken as true on a motion to dismiss.

restrict his right to communicate with members of Congress, and intended to force his resignation. Petitioner claimed that the basis for his removal stated in the letter of termination--"inability to instill career-service motivation in cadets"--was totally spurious and that the respondents Academy staff members, motivated by a desire to stop him from communicating with members of Congress and to interfere with his rights of free speech and association, conspired to intimidate petitioner and thus prevent him from continuing to hold his office as an instructor at the Air Force Academy.

He alleged also that in furtherance of this pattern of intimidation and conspiracy, the respondents knowingly and in conference with each other engaged in a pattern of retaliatory and intimidating conduct toward the petitioner, including an invitation to him to resign; an order to see the staff psychiatrist; restriction from any contact with cadets; subjection to a series of orders severely limiting his freedom of movement and activity and his right to attend classes at Denver University; and further orders to move out of his faculty office and to remove his personal books and effects.

On May 10, 1973, Moore initiated a complaint under Article 138, Uniform Code of Military Justice, complaining of all of the foregoing violations of his rights. The request for redress was denied the following month. Petitioner was assigned

temporarily to Ent Air Force Base, Colorado, on May 2, 1973 as a weather officer. On June 27, 1973, petitioner was notified in writing that he was due for permanent reassignment during the month of July 1973. On July 3, 1973, petitioner filed this action seeking to restrain his permanent transfer, to secure reinstatement to the Air Force Academy faculty, and for money damages. The application to restrain the transfer was denied.

Discovery was thereafter undertaken. Respondents filed a Motion for Summary Judgment on May 31, 1974. The case was subsequently transferred to Honorable Richard P. Matsch, who treated the motion for summary judgment as a motion to dismiss (App., infra, p. 12a) and entered an Order of Dismissal on October 29, 1974 for lack of jurisdiction. Petitioner appealed.

While appeal was pending, petitioner received an overseas assignment. On May 15, 1975, petitioner voluntarily submitted his resignation from all appointments in the Air Force to be effective September 1, 1975, and separation orders were issued on that day. The Court of Appeals heard oral argument on the day after petitioner's resignation became effective. The Circuit Court affirmed the Order of Dismissal of the trial Court on November 21, 1975.

The Court of Appeals, affirmed on the following grounds (even though there was

no evidentiary record in the case) (App., infra, pp. 6a-8a):

1. "Only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether and thus constitute an abuse of the broad discretion granted to military officers in their command will the court be said to have jurisdiction to review the merits of such a dispute."

2. That the amount in controversy requirement of 28 U.S.C. Sec. 1331, though alleged, was not satisfied.

3. That Bivens v. Six Unknown Named Agents, 403 U.S. 388, "has been narrowly read and itself recognizes the immunity of officials who are performing discretionary acts. . ."

REASONS FOR GRANTING THE WRIT

1. In declining to exercise jurisdiction in this case, the Tenth Circuit ignored the fundamental doctrine which has been enunciated by this Court at least since Bell v. Hood, 327 U.S. 678 (1946), that "the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." Id. at 682. In deciding the case the way it did, the Tenth Circuit simply ignored the equally elementary doctrine of Bell v. Hood that "whether the complaint

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states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." Ibid.

It is clear from the opinion of the Court of Appeals that in dismissing the complaint for lack of jurisdiction, it was simply pre-judging the merits, as a matter of both law and fact.

Even in its own terms, the Tenth Circuit's opinion is fatally wrong, for it is not the rule that "only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether . . . will the court be said to have jurisdiction to review the merits of such a dispute" (App., infra, p. 6a). Cf. Parker v. Levy, 417 U.S. 733 (1974); Carlson v. Schlesinger, 511 F. 2d 1327 (D.C. Cir. 1975). For whether rights are denied "altogether" requires a factual determination on the merits, if only based on the allegations of the complaint. But by declining to exercise jurisdiction, the Tenth Circuit clearly has ignored the merits.

The disposition of the case by the Tenth Circuit demonstrates such an elementary misunderstanding of the difference between the exercise of jurisdiction and review on the merits, that the decision below should be summarily reversed with a per

curiam opinion directing the Court of Appeals' attention to Bell v. Hood, supra.

2. The Tenth Circuit supported dismissal of petitioner's complaint on the further ground that, with respect to the money damage claims against the individual defendants, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) "has been narrowly read and itself recognizes the immunity of officials who are performing discretionary acts exercising discretionary authority." App., infra, p. 7a-8a. 2/ This holding is so clearly erroneous, it alone supports summary reversal on this petition. First, Bivens has not been "narrowly read." See cases collected in Emerson, Humber & Dorsen's Political and Civil Rights in the United States (Fourth Edition), pp. 1315-1316. Second, the question of immunity must follow not precede trial. Scheuer v. Rhodes, 416 U.S. 232 (1974).

The fact that 10 U.S.C. §1034 provides no specific sanctions, either civil or criminal, does not foreclose the availability of a remedy, for as Mr. Justice Brennan points out in Bivens, (403 U.S. at 396):

> Of course, the Fourth Amendment does not in so many words

2/ The district court held explicitly that Bivens was "limited to Fourth Amendment rights." App., infra, p.

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> provide for its enforcement by an award of money damages for the consequences of its violation. But "It is . . . well settled that where rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. at 684.

3. The third fundamental error committed below was to decline to exercise jurisdiction on the ground that petitioner failed to meet the jurisdictional amount requirement of 28 U.S.C. Sec. 1331. It is basic doctrine that it must appear to a legal certainty that a claim is worth less than $10,000 before a court may dismiss on that ground. St. Paul Mercury Co. v. Red Cab Company, 303 U.S. 283 (1938). There was no such certainty here, for petitioner had alleged his unlawful removal from his faculty post, removal from his family, interruption of his work toward an advanced degree and damage to his professional reputation. Surely, in the face of those claims, no court could reasonably hold prior to trial that petitioners' damages could, to a legal certainty, be said to fall short of $10,000. Cf. Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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